

LETTER OPINION
96-L-57

April 8, 1996

Mr. Bruce A. Romanick
Assistant State's Attorney
Burleigh County
514 E Thayer Ave
Bismarck, ND 58501

Dear Mr. Romanick:

Thank you for your letter in which you ask whether the section line right-of-way applies to land created by accretion after the original survey.

This issue was addressed in Greeman v. Smith, 138 N.W.2d 433 (N.D. 1965), a quiet title action concerning land along the Missouri River south of Bismarck. Morton County asserted that a public right-of-way extended across accreted land. While the opinion is unclear whether the right-of-way was a section line, the briefs filed with the court explain that a section line was at issue. Brief of Appellants at 2-5, 46, Greeman v. Smith (No. 8139); Brief of Respondents at 22-23, Greeman v. Smith (No. 8139). The trial court held that the right-of-way extended over the accreted land. Id. It relied upon what is now N.D.C.C. § 47-06-05. This statute provides that accreted land belongs to the riparian landowner "subject to any existing right of way over the bank."

The North Dakota Supreme Court affirmed the trial court's decision, citing State v. Yates, 71 A. 1018 (Me. 1908). Greeman, 138 N.W.2d at 439. Yates involved a street laid out in 1871 pursuant to statute and which terminated at the high watermark. During the following years the land grew by accretion. The court in Yates ruled that a public easement on riparian land extends to accreted land. Id. at 1020. The Yates court cited several other cases holding that public streets leading to public waters keep pace with extensions of land caused by accretion. Relying on such authority, the Greeman court ruled: "We believe that the [section line] easement . . . has been extended by accretion in a northerly direction from the point where the section line terminated at the time of the original survey to the point where the section line, if extended due north, would now

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intersect the west bank of the Missouri River." Greeman, 138 N.W.2d at 439.

In Smith v. Bruce, 244 S.E.2d 559, 570 (Ga. 1978), the court noted that land accreting to riparian lots belongs to the lot owners, and also that "any adjacent streets . . . would also be extended eastwardly by accretion in the same manner and to the same extent as the lots." See also Hathaway v. City of Milwaukee, 111 N.W. 570, 573 (Wis. 1907) (a public right-of-way easement on riparian land attaches to any accretions that may be apportioned to the land).

Greeman is consistent with the statute governing the public's right to section lines. N.D.C.C. § 24-07-03 states that "congressional section lines are public roads." See also Lalim v. Williams County, 105 N.W.2d 339, 344 (N.D. 1960) ("The legislature has declared that . . . congressional section lines shall be considered public roads"). The statute makes no exceptions to how or when the land upon which a section line exists was created. "[A]ll" section lines fall within the statute. Huffman v. Bd. of Supervisors, 182 N.W. 459, 461 (N.D. 1921).

Greeman is also consistent with the state's policy of protecting the public's interest in the section line right-of-way. E.g., Burleigh County Water Resource Dist. v. Burleigh County, 510 N.W.2d 624, 628 (N.D. 1994) (the county cannot arbitrarily approve an encroachment that completely blocks the public from using a section line); Small v. Burleigh County, 225 N.W.2d 295, 300 (N.D. 1975) (section lines are open to public travel without the necessity of any action by township or county government); Lalim, 105 N.W.2d at 344 (the section line right-of-way is held by the state in trust for the benefit of the public); Wenberg v. Gibbs Tp., 153 N.W. 440, 441 (N.D. 1915) (railroad land is subject to the section line easement); Walcott Tp. v. Skauge, 71 N.W. 544, 546 (N.D. 1897) (the public has a vested, absolute right to use section lines).

Your letter indicates that a developer of accreted land believes that section lines were not contained over property covered by water at the time of the original government survey and were simply added by the surveyor. A similar issue arose recently regarding the bed of Devils Lake:

[T]he fact that the lake bed was not sold as public land based on the government survey does not mean that submerged land is not surveyed. The official plat still describes the location of these submerged sections.

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1995 N.D. Op. Att'y Gen. L-108, L-109. In both the situation you describe and the one involving Devils Lake, the official township plat does not stop at the waters edge, but surveys submerged land according to the numerical sequence started on dry land. Thus, just as the official plat of the congressional township at issue divides submerged land into sections, those sections are divided by section lines. The fact that submerged section lines are not completely drawn in on the official plat or marked with corner posts does not support the conclusion that such section lines do not exist.

Based on Greeman, decisions from other jurisdictions, N.D.C.C. § 24-07-03, and the policy favoring the public's interest in travel upon section lines, it is my opinion that the section line right-of-way applies to accreted land.

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

cmc/vkk